Democratic experimentalism in comparative constitutional social rights remedies

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ABSTRACT

Arguments in favor of democratic experimentalism in the adjudication of social rights focus on its ability to foster democratic engagement through deliberation and learning about party preferences in litigation, while also decentering the court and permitting the representation of a broader range of stakeholders and interests in the judicial process. However, experimentalist processes can be normatively weak, reinforce deliberative inequalities between parties, and can expose the limits to localized solutions. The academic literature on experimentalism in social rights cases has focused on discrete, but related strands of the adjudicative process, focusing on forms of dialogic remedies, catalytic remedial practices, and empowered participatory jurisprudence. In this article, I locate recent adjudicative practice by the judiciaries in India and South Africa within the democratic experimentalist framework. Part I of the article lays out the general theoretical framework to understand democratic experimentalist practices which helps us spot what is - and is not - judicial practice that adheres to such a framework, while

also laying out the strengths and weaknesses of such approaches. I claim that a democratic experimentalist framework is an *analytic*, rather than a *descriptive* category of judicial approaches. Part II offers a novel framework to understand democratic experimentalist approaches to the adjudicative enterprise by suggesting that they are best understood as: a) ways of arriving at a remedy in social rights litigation (*experimentalist remedial design*), b) ways of following up, monitoring, and evaluating compliance with the judgments and orders of a court (*experimentalist remedial oversight*). Parts III and IV use the framework developed in Part II to describe two cases each from South Africa and India, which used, with varying degrees of success, democratic experimentalist approaches to adjudication. I conclude by reading the tealeaves and sketching the prospects for such an approach in future cases in these two courts, as well as courts around the world – when adjudicating social rights.

Keywords: Democratic experimentalism – Socioeconomic rights – Judicial review – Separation of powers – Comparative constitutional studies

Il presente contributo è stato sottoposto a referaggio anonimo

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1. Introduction

In a celebrated article in 2015, Katharine Young and Sandra Liebenberg asked whether democratic experimentalism can help in the adjudication of social rights ([1]). Their arguments in favor of a democratic experimentalist court focused on its ability to foster democratic engagement through deliberation and learning about party preferences in litigation, while also decentering the court and permitting the representation of a broader range of stakeholders and interests in the judicial process. They however urged caution against the normative weakness and limits to localized solutions, which inhere in the democratic experimentalist adjudicative enterprise, while also being alive to its feature of reinforcing deliberative inequalities between parties. Since then, there has been an explosion in writing not only about democratic

([1]) K.G. YOUNG and S. LIEBENBERG, *Adjudicating social and economic rights: can democratic experimentalism help?*, in *Social and economic rights in theory and practice: critical inquiries*, eds. by H. ALVIAR GARCIA *et al*., Routledge, 2015, 238.

experimentalism, but also forms of dialogic remedies ([2]), catalytic remedial practices ([3]), and empowered participatory jurisprudence ([4]).

In this article, I locate recent adjudicative practice by the judiciaries in India and South Africa within the democratic experimentalist framework. Part I of the article lays out the general theoretical framework available under a democratic experimentalist framework, which helps comprehend, what is - and is not - judicial practice that adheres to such a framework. My claim will be that a democratic experimentalist framework is an analytic, rather than a descriptive category of judicial approaches. I also lay out the strengths and weaknesses of such approaches. Part II offers a novel framework to understand democratic experimentalist approaches to the adjudicative enterprise. I do so by suggesting that democratic experimentalist approaches are best understood as: a) ways of arriving at a remedy in social rights litigation (*experimentalist remedial design*), b) ways of following up, monitoring, and evaluating compliance with the judgments and orders of a court (*experimentalist remedial oversight*). Parts III and IV use the framework developed in Part II to describe two cases each from South Africa and India, which used, with varying degrees of success, democratic experimentalist approaches to adjudication. I conclude by reading the tealeaves and sketching the prospects for such an approach in future cases in these two courts, as well as courts around the world – when adjudicating social rights.

2. Part I Democratic experimentalism: the general framework

The adjudication of social rights in jurisdictions across the world runs into a number of issues, which include those based on theoretical, pragmatic, and efficacy concerns. The theoretical concerns include those relating to the democratic legitimacy of judges exercising choices over scarce government budgets and possibly order their reallocation and concerns over the proper role of the judiciary in democratic polity ([5]). The pragmatic concerns include those based on the lack of expertise and information, which judges have at deciding cases based on social rights claims that are polycentric in nature ([6]).Concerns around efficacy turn primarily on whether judicial review can achieve lasting social change.

([2]) S. LIEBENBERG, *The participatory democratic turn in South Africa's social rights jurisprudence*, in *The future of economic and social rights*, ed. by K.G. Young, Cambridge University Press, 2019.
([3]) K. YOUNG, *Constituting social and economic rights*, Oxford University Press, 2012.
([4]) C. RODRIGUEZ GARAVITO, *Empowered participatory jurisprudence: experimentation, deliberation and norms in socioeconomic rights adjudication*, in *The future of economic and social rights*, quoted, 233.
([5]) C. MBAZIRA, *Litigating socio-economic rights in South Africa: a choice between corrective and distributive justice*, Pretoria University Law Press, 2009, Ch. 5.
([6]) J. KING, *The pervasiveness of polycentricity*, in *Public Law*, 2008, 101-103.

2.1. The benefits of a democratic experimentalist approaches

In the arriving at decisions using an experimentalist approach, courts can draw on the "the normative output of one or more specialized bodies of stakeholders" ([7]). This enables court to often avoid the usual charge of activism or usurpation of the policy making domain by facilitating a procedural approach to problem solving, rather than being asked to determine the substance of a right at stake. Since there is usually deep disagreement on the content of a particular right, courts in experimentalist frameworks are tasked with a "dialogic reconciliation of diverse views among stakeholders about premises or goals on the one hand and conclusions or means on the other" ([8]). Therefore, courts, when adjudicating rights, are asked to draw on localized forms of knowledge in order to aid their lack of information and expertise when iteratively determining the content of rights. Since constitutional social rights provisions are often framed at a high level of abstraction ([9]), courts can determine a prophylactic standard with which compliance can be ensured. A change of course from this standard would require very strenuous justification. States and their organs, many of which are likely to find themselves party to legal proceedings are therefore encouraged to experiment and aid courts in their epistemic shortcomings by articulating standards which may protect the right better. Such an approach is especially useful in social rights cases, which by their nature are complex and require dynamic responses to risks and problems which may be identified at emerging stages of a process of problem-solving. This presents a move away from a top-down, directive approach to judicial problem-solving, to one where the court plays a facilitative and supportive role ([10]). Chenwi also calls for the need to involve stakeholders at the three stages in the usual judicial proceedings: at the stage of right

([7]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, in *Michigan Law Review*, 110, 2012, 1265.

([8]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, quoted, 1265.

([9]) Take for example, the right to access adequate housing in the South African Constitution:
"26. Housing
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

([10]) C.F. SABEL and W.H. SIMON, *Contextualizing regimes: institutionalization as a response to the limits of interpretation and policy engineering*, quoted, 1265.

enforcement (including, if possible, prior to litigation ([11]), at the stage of remedy formulation, as well as during the remedy implementation stage ([12]).

2.2. Democratic experimentalism and its drawbacks

In the previous sub-section, I described the upshot of experimentalist approaches to constitutional social remedies. There are, however, a few risks associated with such approaches. They can be classified into at least four types: a) participatory parity, b) normative weight of experimentalist remedies, c) judicial function abdication, d) substantive judicial avoidance. I deal with each of them in turn.

a) Participatory Parity – Litigation which originates in social rights claims usually involve a private party bringing an action against the state ([13]). This will imply that the state is able to marshal greater financial resources, time, and organizational capacity against private individuals, many of whom live in conditions of material and temporal insufficiency. Litigation is a resource and time intensive activity, aided of course by the kinds of strategic litigator actors which abound in SER based cases. Therefore, it is imperative that experimentalist processes do not end up replicating the kinds of deliberative inequalities which currently exist in traditional forms of adversarial litigation.

b) Normative weight of experimentalist remedies – In common law systems, decisions by judges usually serve as a guide for judicial action in future cases. Judicial review enjoys the advantage of decisional particularity by applying a set of indeterminate constitutional or statutory provisions to concrete facts. While doing so, they tell us how to think about a particular right in question in relation to future cases, providing guidance to a range of government actors on the way. With experimental remedies which are highly contextualized, the normative weight of a decision in providing a roadmap for action in future cases (whether litigated or not) is called into question.

([11]) *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1, par. 30, in http://www.saflii.org/za/cases/ZACC/2008/1.html ; see also B. RAY, *Engagement's possibilities and limits as a socioeconomic rights remedy*, in *Wash. U. Glob. Stud. L. Rev.*, 9, 2010, 399-418, stating that this kind of engagement should be termed 'political engagement', and that "extending engagement beyond a litigation aspect and turning it into an administrative requirement offers the greatest potential for making the remedy a meaningful tool for implementing section 26 and other."

([12]) The residents of the housing society in question received the upgrade which had previously been deemed infeasible by the city, see *Residents of Joe Slovo Community, Western Cape v. Thebelisha Homes and Others* (CCT 22/08) [2011] ZACC 8 (31 March 2011) (Joe Slovo II), in http://www.saflii.org/za/cases/ZACC/2011/8.html .

([13])There are notable exceptions to this of course, with the most prominent example from South Africa being cases where persons occupy and erect homes/structures on private land, which often leads to protracted litigation which implicates the private owners' right to property and the occupiers' right to not be evicted from the premises without a court order.

c) Judicial Function Abdication – The judicial function is the adjudication of concrete disputes by using the applicable law. This differs from the function of coordinate branches of government whose task is to formulate legislation, make policy and apply these to remedy social problems.

d) Substantive Judicial Avoidance – Experimentalist remedies may encourage courts to avoid engaging with the substantive standards that are often urged to be articulated by petitioners who are left frustrated by their deference to the government when it comes to determining the levels of entitlements to be ensured by social rights. Take for example the kinds of kind of seemingly undesirable outcome which resulted in *Lindiwe Mazibuko v. City of Johannesburg* ([14]), where the Constitutional Court of South Africa refused to set a quantitative standard on the amount of water which the petitioners were to receive, stating that such needs change over time, and that it was a democratic and executive prerogative since "it is desirable as a matter of democratic accountability that they should do so for it is their programs and promises that are subjected to democratic popular choice" ([15]). It is not clear if this would not have been averted, had an experimentalist approach. Concerns about the parity of participation between parties and a good faith disagreement over the amount of water which a household was entitled to on a daily basis would linger, resulting in as unsatisfactory an outcome that had been seen. Such a situation may require the articulation of normative principles (derived from, among others, international best practices) on social entitlements, which often cannot be consensually arrived at. This has led to a conflation of institutional concerns about *who* the duty bearer is, with the judicial duty to develop the content of a right, or engage in a process of excavating the constitutional adequacy of a right (often in conversation with amicus and members of the government, in order to aid its lack of expertise) ([16]).

3. Part II Democratic experimentalism in social rights remedies: experimentalist remedial design and experimentalist remedial oversight

Judicial remedies which have experimentalist features They share some characteristics with adjudicatory models described in a seminal work on public law remedies in the United States ([17]), but these are not meant to be normative or descriptive categories, but are analytic: drawn from a study of the different processes that have been used in judicial orders.

([14]) *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28, in http://www.saflii.org/za/cases/ZACC/2009/28.html .

([15]) *Mazibuko and Others v City of Johannesburg and Others*, quoted, par. 61.

([16]) D. BILCHITZ, *Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?*, in *The evolution of the separation of powers between the global north and the global south*, eds. by D. Bilchitz and D. Landau, Edward Elgar, 2018, 57-60.

([17]) S. STURM, *A normative theory of public law remedies*, in *Georgetown LJ*, 79, 1991, 1355.

1) Experimentalist Remedial Design: In this kind of experimentalist approach, when there is no clear remedy or if courts are agnostic about the way forward, they may experiment with the design of remedies, often asking non-parties (amici, experts) to offer solutions in consultation with the aggrieved parties and the state authority. In some cases, there is an expert appointed with the mandate of developing a remedial plan. Depending on the case, and the factors and conditions described in the preceding sections, these experts can act in extension of the court's supervisory powers and have some form of a judicial function. The primacy given to experts may result in the exclusion of stakeholder voices ([18]) – this can be managed by the stakeholder consultation being made an explicit part of the expert's mandate.

2) Experimentalist Remedial Oversight – Courts do not have the institutional capacity to ensure that their judgments are complied with. Social rights judgments often involve a reallocation of the budget or a change in the order of priorities for a government, whether at the local or national level, and therefore, they may be perverse incentives to not obey orders. Therefore, in this kind of remedial formulation, courts are concerned with weak state capacity or political unwillingness to implement their judgments. Therefore, courts may experiment with the setting up of an institutionalized mechanism to ensure compliance and order that the officials in the institution report back to the court with regular reports on compliance.

4. Part III Experimentalist remedial design: the South African Social Grants Payments Case

4.1. AllPay: the social grant system and its discontents

In this kind of order, there is a multi-step, multi-stakeholder judicial proceeding, with amicus curiae intervening in the proceedings to assist the court in terms of information and expertise. A prominent example of the use of experts in the formulation of the remedy is seen in the handling of the social security payment crisis, which gripped South Africa in 2012-13. Section 27 ([19]) of the South African Constitution provides for the right to social security in its constitution, and until the mid-2000s, there was a largely fragmented system of social security. There was a significant overhaul and consolidation of the social grant system with the enactment of the South African Social Security Agency

([18]) Arguments of this nature have been made in the Indian context especially, with the primacy of amicus curiae voices in deciding cases where the rights of informal settlement dwellers have had to be weighed against environmental concerns and property rights of land owners. See A. BHUWANIA, *The case that felled a city: examining the politics of Indian public interest litigation through one case*, in *South Asia multidisciplinary academic journal [online]*, 17, 2018. In a separate vein, in Kenya in the Mitu-Bell case, where the involvement of civil society organizations.

([19]) Section 27 as follows: "(1) Everyone has the right to have access to – [...] (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance."

Act of 2004 that established the South African Social Security Agency (SASSA) as an agent for the administration, management, and payment of social assistance ([20]).

In the past there had mainly been litigation focused on eligibility ([21]) and exclusions, but never on the content of the right. The conduct of SASSA in the tender process for finding a service provider to take over grant payment was the key governmental action challenged in court – an act that indubitably has an effect for the realization of a socioeconomic right was at stake in the cases ([22]).

Therefore, although the series of cases on social payments often turned on administrative law grounds, the kinds of remedial innovation we see in them has important implications for the development of the case law on the remedial powers of courts in South Africa. While the use of experts in assisting courts with its lack of institutional expertise and information is not new, the use of external actors in overseeing the implementation of a remedy is, or rather was, unusual in South African constitutional jurisprudence. The use of an external actor was seen in the appointment of a claims administrator in the *Linkside* case ([23]) involving teacher shortages in Eastern Cape and an independent auditor for evaluating the sufficiency of school infrastructure in *Madzodzo* ([24]). This process of institutions of the higher judiciary using remedial

([20]) B. GOLDBLATT and S. ROSA, *Social security rights: campaigns and courts*, in *Socioeconomic rights in South Africa: symbols or substance?*, eds. by M. Langford, B. Cousins and T. Madlingozi, Cambridge University Press, 2016, 253-256.

([21]) These were decided primarily on equality grounds: See *Khosa & Ors v Minister of Social Development & Ors*, 2004(6) BCLR 569 (CC), in https://www.escr-net.org/caselaw/2006/khosa-ors-v-minister-social-development-ors-cited-20046-bclr-569-cc . See also the admission of Justice Kate O' Regan in G. PIENAAR, *Justice O' Regan: finding the Aristotelian golden 'middle way'*, in *Making the road by walking: the evolution of the South African Constitution*, eds. by N. Bohler-Muller, M. Cosser and G. Pienaar, Pretoria University Law Press, 2018, 126-135: "contrary to any perception that the Court had overreached and strayed into executive territory, should be attributed to appropriate weight being afforded to the fundamental constitutional right and value of equality. The decision did not signal an exception to the Court's approach to the progressive realisation of SERs."

([22]) A*llpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42, in http://www.saflii.org/za/cases/ZACC/2013/42.html ('AllPay I'; this decided on the constitutional and statutory validity of the tender process); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* (No 2) [2014] ZACC 12, in http://www.saflii.org/za/cases/ZACC/2014/12.html ('AllPay II'; this designed the remedy); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* [2015] ZACC 7, in http://www.saflii.org/za/cases/ZACC/2015/7.html ('AllPay III'; this case concerned the non-compliance of the amended terms of the tender process [esp. the RFP] with the requirements set out by the CC in AllPay 2).

([23]) *Linkside & Others v Minister for Basic Education & Others* [2015] ZAECGHC 36, in http://www.saflii.org/za/cases/ZAECGHC/2015/36.html .

([24]) *Madzodzo & Others v Minister of Basic Education & Others* [2014] ZAECMHC 5, in http://www.saflii.org/za/cases/ZAECMHC/2014/5.html .

innovations developed in lower courts is described as remedial cross-fertilization ([25]). and has the capacity to lend them legitimacy and to bring such innovations in the judicial mainstream.

With the existing contract which SASSA had with service providers to pay out social grants coming an end on 31 March 2012, it issued a Request for Proposals (RFP) which laid out a detailed process for the submission of bids ([26]). After several rounds, there were 2 bidders – AllPay and Cash Paymaster (CPS), with CPS finally winning the bid. AllPay alleged that there were several deficiencies in the bidding process, all of which influenced the final outcome. The High Court declared the tender process invalid but declined to set the award aside because of the practical upheaval this would have involved ([27]). There was a similar result at the Supreme Court of Appeal. However, the CC held that the bidding procedure was constitutionally invalid because SASSA failed to ensure that the black empowerment credentials claimed by CPS were objectively confirmed ([28]) as well as a lack of clarity on what the RFP required bidders in relation to biometric verification, the consequence of which was that only CPS was considered in the second stage of the process ([29]).

In designing the remedy, the Constitutional Court was guided by the fact that SASSA, CPS, and AllPay could not adequately apprise the bench hearing the matter of the concerns which would arise if the contract with CPS was declared invalid and they would be able to walk away from their responsibilities under the contract. This would have a cascade of consequences, including the likely denial of social grant payments to millions of beneficiaries. However, it also stated "procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner" ([30]). It therefore was guided by evidence provided by Corruption Watch, the first amicus curiae ([31]) on the

([25]) H. TAYLOR, *Forcing the court's remedial hand: non-compliance as a catalyst for remedial innovation*, in *Constitutional Court Review*, 9, 2019, 247.

([26]) AllPay 1, par. 9.

([27]) AllPay 1, par. 2.

([28]) AllPay 1, par. 72. For an interesting take on the role played by the CC in legitimating and guiding the statutory Black Economic Empowerment agenda of the ANC, see D.K. MA, *Explaining judicial authority in dominant-party democracies: the case of the Constitutional Court of South Africa*, in *Comparative Politics*, 52(3), 2020, 1-18: "The ANC government needs an authoritative Court in place to be able to reap the huge political and economic benefits associated with implementing BEE equity transfers." The CC hints at this in AllPay 1, par. 4: "Procurement policy under section 217 also involves the protection and advancement of persons or categories of persons disadvantaged by past unfair discrimination. The public interest in the fairness of that vital aspect of the economic transformation of our country is also clear."

([29]) AllPay 1, par. 91.

([30]) AllPay 1, par. 4.

([31]) Described by the Court as "an independent, non-profit civil society organisation that seeks to promote transparency and accountability to protect beneficiaries of public goods and services. It also seeks to fight corruption and the abuse of public funds."

rule of law concerns, from the Centre for Child Law (which expressed a preference for a suspended order of invalidity) ([32]). Crucially, the Centre for Child Law sought a *prioritization* of the interests of beneficiaries over the broader rule of law and costs concerns which amici like Corruption Watch and Black Sash (who raised the issue of unlawful deductions from payments) had raised. The Court finally opted to suspend its declaration of invalidity of the contract, and asked CPS to continue its obligations under the existing contract ([33]) - primarily due to the looming possibility of a break in continuity of grant payments. At the same time, in AllPay II, it ordered the reconduct of the bid process, while also laying down certain criteria to be followed in the process. The declaration of invalidity would be suspended pending the completion of the tender process, and in the event that the process could not be completed in accordance with the guidelines laid down in AllPay II and AllPay III, SASSA would have to report back to the Court. In this way, it was able to (albeit unsuccessfully) manage to balance the rule of law and social rights concerns.

The decision discussed here was based primarily on administrative review of tender process grounds, which is determined by criteria laid down in the Promotion of Administrative Justice Act, 2000 (PAJA). However, what is important here is the way in which the CC repeatedly invoked the interests of beneficiaries of the social security system who were not represented before the Court in guiding, and at times, constraining, its interpretation of the constitutional and statutory propriety of the tender process. This is a classic example of a polycentric problem – where the interests of a number of parties that are not before the Court (in this case, the recipients of payments from SASSA) are required to be considered prior to the passing of the order. This feature of the dispute can understandably limits a court's ability to fully appreciate the range of concerns which may be before it and would effect a decision that 'is based on so many

([32]) See AllPay II, par. 26-27: "The other amicus curiae, the Centre for Child Law (Centre), expressed a preference to suspend the declaration of invalidity until the end of the existing contractual period. The Centre's basic premise is that it would be inappropriate for the Court to order a new tender if it would result in a new registration process […] According to the Centre, the relevant factors when considering setting the tender aside are the— (a) interest of beneficiaries in the uninterrupted payment of social grants, especially that of children."

([33]) See AllPay II, par. 66: "Where an entity has performed a constitutional function for a significant period already, as [CPS] has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on [CPS] fulfilling its constitutional obligations. For this reason, [CPS] cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational." The Court inferred a degree of constitutional obligation to a private entity in this case, an aspect that is analysed in M. FINN, *AllPay remedy: dissecting the constitutional court's approach to organs of state*, in *Const. Ct. Rev*. 6, 2013, 258.

interlocking factors that it is not (properly) ([34]) susceptible to the decision-making processes of courts ([35]).

4.2. Reconstruction of the ways in which the court dealt with theoretical concerns in the literature

The Court in one which displays remedial flexibility – it has a range of remedial options before it, including an outright declaration of invalidity of the contract between CPS and SASSA, but is concerned with the fallout, especially since the case implicates "social security for people who are unable to support themselves, particularly children" ([36]). The perusal of the judgment of the Court in Black Sash I (par. 18) indicates that the Court, which had retained supervisory jurisdiction in AllPay III, found that the progress report filed by SASSA in terms of its order was sufficient and that it was no longer necessary to retain jurisdiction over the case, despite the extensive discussion of the unsatisfactory conduct of the government agency ([37]). This indicates its respect for the principle of separation of powers, which is further displayed in its decision in AllPay II to only declare the award of the contract to be unconstitutional ("correction to the extent of the constitutional inconsistency" ([38])), while leaving it to SASSA to determine whether to award a new contract or not, albeit in line with the requirements the CC had set out. Therefore, it is clear that the support structures to realise rights vary extensively, and that a separationist approach which takes these seriously is a better way to engage with the decisions of courts. It is also important to not just regard both the AllPay and Black Sash cases as dealing exclusively with the process of administration, but as cases which have serious implications for the remedial process in SER going forward. In this way, it shows how courts can be receptive to a popular outcry about crises of maladministration, corruption, or political stasis ([39]), especially if the underlying issue has broad national salience.

5. Experimentalist remedial oversight: black sash

The key takeaway from the AllPay cases discussed above was that despite a finding of unconstitutionality, the operational part of the judgment cancelling the tender remained under suspension pending the reconduct of the tender process. In the event

([34]) The insertion of this word is mine.

([35]) K. O' REGAN, *Breaking ground: some thoughts on the seismic shift in our administrative law*, in *S. African L.J.* 121, 2004, 424.

([36]) AllPay I, par. 4. See also AllPay II par. 39: "a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position It may lie somewhere in between."

([37]) AllPay I, par. 75.

([38]) AllPay II, par. 45.

([39]) R.A. KAGAN, D. KAPISZEWSKI and G. SILVERSTEIN, *New judicial roles in governance in comparative judicial review*, in *Research handbooks in comparative constitutional law*, eds. by E.F. Delaney and R. Dixon, Edward Elgar Publishing, 2018, 144.

that the tender process could not be completed in accordance with the terms set out by the CC, then SASSA would have to report back to the Court to apprise it of the reasons why, and whether it could take over the payment of the grants instead of an award to a third party provider. In November 2015, SASSA finally reported that it had decided not to award a new tender and it would itself take over the payment of social grants and it would be able to meet a deadline of 31 March 2017, when it would itself take over the payment of social grants. However, despite this undertaking, which formed the basis for the relinquishment of the CC's supervisory jurisdiction ([40]), it had apparently become clear since April 2016 that SASSA would not be in a position to take over payments. SASSA and the Minister failed to report back to the Court that it could not take over payment. The case was brought by Black Sash ([41]) which had been closely monitoring the situation as a direct access application to the CC, which was granted due to the extraordinary situation which confronted the Court.

The Court ordered that in the interest of the beneficiaries of the social grants payments, SASSA and CPS were "under a constitutional obligation to ensure payment of social grants to grant beneficiaries from 1 April 2017 until an entity other than CPS is able to do so and that a failure to do so will infringe upon grant beneficiaries' rights of access to social assistance under section 27(1)(c) of the Constitution" ([42]). The declaration of invalidity of the contract which the CC had done in AllPay II was further suspended for a 12-month period from 1 April 2017. CPS and SASSA would also have to conclude an interim agreement which would include adequate data privacy safeguards ([43]) to continue paying the social grants for a 12-month period. After the expiry of the 12-month period, the Minister and SASSA would have to report back to the CC to set out how they planned to ensure the payment of social grants after this period.

5.1. Oversight of court order by expert panel

The CC appears to have burned its fingers with the relinquishment of supervisory jurisdiction after AllPay III, and alludes to the "extraordinary conduct of the Minister of Social Development (Minister) and of the South African Social Security Agency (SASSA) that have placed the achievement of the establishment of an inclusive and effective programme of social assistance in jeopardy" ([44]). Therefore, the Court

([40]) Black Sash I, par. 59: The Court stated that "SASSA and the Minister have used the discharge by this Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the Court when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself." This is disingenuous and incorrect.

([41]) Black Sash Trust describes itself as "a 65 year old veteran human rights organisation advocating for social justice in South Africa.": see https://www.blacksash.org.za/ .

([42]) Black Sash I (order).

([43]) This was one of the suggestions, which the amici had made.

([44]) Black Sash, par. 1.

ordered the setting up of a panel of experts ([45]) which included the appointment of the Auditor- General and suitably qualified independent legal practitioners and technical experts to jointly evaluate and report to the Court on SASSA's compliance with the terms of its orders. This in many ways signaled the lessons it had imbibed from the non-compliance of a state body with its judgments and the consequent institutional responsiveness. It can be said that the independent panel of experts offered a measure of accountability in light of SASSA's intransigence, while their technical and legal expertise had the capacity to address the institutional incapacity, which had prevented SASSA from taking up the role of paying of social grants itself.

5.2. Four factors which contributed to the invasive remedy

The CC throughout the judgment takes great pains to point out that the remedy it granted is one born out of the circumstances. The observations of the Court merit reproduction in full ([46]):

> In a constitutional democracy like ours, it is inevitable that at times tension will arise between the different arms of government when a potential intrusion into the domain of another is at stake. It is at times like these that courts tread cautiously to preserve the comity between the judicial branch of government and the other branches of government. But there was no constitutional tension about social grants in November 2015. There was no legitimate reason for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was no threatened infringement to people's social assistance rights and no suggestion that the foundation of the Court's remedial order would be disregarded. Now there is.

The court additionally highlighted three other factors which go some way in explaining the grant of the remedy: the first is the lack of comity which would facilitate the Court to engage more aggressively with the values of trust and respect which underlie the separation of powers, and had in the past led it to grant less invasive remedies ([47]). A necessary implication of such a statement is that there are certain principles of institutional morality flowing from the separation of powers which frame and shape the interaction between the branches of government and in cases where there are departures from adherence to such principles, courts would be likely to intervene in

([45]) The manner in which the panel was appointed was through mutual consent of the parties. See Black Sash I, par. 11: "The parties are, within 14 days from the date of this order, required to submit the names of individuals, with their written consent, suitably qualified for appointment as independent legal practitioners and technical experts […]."

([46]) Black Sash I, par. 10.

([47])See Black Sash I, par. 13: "Until the forced reply to this Court's directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government."

a more concerted way. The second was the broken promises made by both SASSA and the Minister (upon whom the Court imposed personal costs), and the third was the need to ensure accountability ([48]).

5.3. Reconstruction of the ways in which the court dealt with theoretical concerns in the literature

Black Sash shows a Court that is much less concerned with the separation of powers type arguments which had come to dominate its decision the AllPay cases as well as its past jurisprudence for the kinds of reasons discussed in the previous section. It is also clear now that it derives authority for the appointment of external agents from *Grootboom* and the *Madzodzo* case, which involved a litigation in the HC brought by the LRC against the Department of Education on the severe furniture shortages in public schools across the Eastern Cape ([49]).

The combination of intransigence, inaction and inattentiveness of the Minister and SASSA also had a clear role to play, as well as persistent non-compliance now emerging as a category, which deserves attention in its own right. The kinds of consequentialist reasoning applied by the Court can also be disjunct from its reasoning on the intrinsic need for fairness and the adherence to the rule of law for the process of administering public contracts, which have an impact on the realization of SER.

6. Part IV: Experimentalist remedial design in the School Dropout Case

6.1. The right to education in the Out-of-School Children Case: a background

The information and expertise problems which courts run into is exemplified by the problems which the High Court of Karnataka encountered in the *Out-of-School Children* Case in 2015 ([50]).

The case was taken up *suo motu* by the High Court of Karnataka by invoking its fundamental rights jurisdiction after a newspaper report highlighted the exceedingly high number of primary school children who had become dropouts in the state of

([48]) See Black Sash I, par. 15: "What needs to be understood, however, is that it is not this Court's standing or authority, for their own sakes, that are important. Judges hold office to serve the people, just as members of the executive and legislature do. The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat. A graphic illustration would be if social grants are not paid beyond 31 March 2017."

([49]) *Madzodzo & Others v Minister of Basic Education & Others*, quoted.

([50]) *Registrar (Judicial) of High Court of Karnataka v. State of Karnataka* W.P. 15768 of 2013 quoted in OPEN SOCIETY JUSTICE INITIATIVE, *Strategic litigation impacts: equal access to quality education*, Open Society Foundations Education Support Program, Open Society Foundations, 2017, 44.

Karnataka ([51]). The case is emblematic of an experimentalist, contextualized approach to problem solving, where the realization of a right is contingent not only its substantive content, but also upon a set of extra-legal factors that may be compounded by the lack of a coherent institutional response to it. The logistical infrastructure for the realization of a right is therefore just as important as the right itself.

The right to education is the only social right, which is textually entrenched in the Indian constitution. While there are a number of other social rights which have been 'read in' to the right to life through a series of judgments from the Supreme Court of India and through legislation, it is the right to education that was included through a constitutional amendment as a fundamental right in 2002 ([52]). Since then, there have been a number of doctrinal constitutional challenges to the law (notably by minority religious groups and private school operators) ([53]), while some have expressed concern about the onerous infrastructural requirements the law imposes on smaller schools ([54]), as well as persistently low levels of learning outcomes despite the coming into force of the Act ([55]).

6.2. The Out-of-School-Children Case: preliminary orders

Following a 2013 newspaper report about the 150,000 out-of-school-children in the state of Karnataka, a single judge bench of the High Court of Karnataka (exercising its *suo motu* jurisdiction (Writ Petition No. 15768/2013), asked the state government to devise steps to remedy this problem. State high courts in India exercise jurisdiction concurrently with its Supreme Court in addressing fundamental rights violations such as the one in this case.

The proceedings to remedy the OOSC problem proceeded in three steps. First, the state government, following an order of the High Court, put together a committee comprising the representatives of all 14 state government departments, members of civil

([51]) It is important to state here that I was part of the legal team for the Azim Premji Foundation, an organization which filed amicus curiae briefs at various stages in the litigation and had been part of the High Powered Committee that had been set up to tackle the school dropout problem.
([52]) In 2002, Article 21A was inserted into the Constitution through The Constitution (Eighty-sixth Amendment) Act, 2002, which stated that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". See, F. MATTHEY-PRAKASH, *The right to education in India: the importance of enforceability of a fundamental right*, New Delhi, 2019, for description and analysis of the process of enactment and subsequent judicial interpretation of the right.
([53]) G. MUKHERJEE, *The case against excluding minority institutions from the RTE act*, in *The Supreme Court and the Constitution: an Indian discourse*, eds. by S. Khurshid, L. Malik and Y. Pratap Singh, Wolters Kluwer, 2020.
([54]) G. KINGDON, *Schooling without learning: how the RTE act destroys private schools and destroys standards in public schools*, in *Times of India*, 26 August 2015, https://timesofindia.indiatimes.com/blogs/author/geeta-kingdon/ .
([55]) SPECIAL CORRESPONDENT, *Annual status of education report flags poor learning outcomes in schools*, in *The Hindu*, 15 January 2020, https://www.thehindu.com/news/national/aser-flags-poor-learning-outcomes-in-schools/article30569671.ece .

society organisations which had approached the Court, as well as their legal counsels ([56]).

Second, the committee, with the assistance of civil society representatives and government officials tracked down the out-of-school-children, whose number was around 200% higher than originally calculated. Third, using a combination of enrolment drives and admission camps organized in a number of villages in the state, the government officials and civil society members sought to enroll and retain the children they had tracked down. Over a two-year period, there was a 75% reduction in the number of out-of-school-children. It should be pointed out here that in this period, interim orders of the High Court legally obliged the committee to convene monthly and the state government to provide status reports on the ongoing steps to reduce the out-of-school-children numbers. The case also had an impact on the functioning of the education bureaucracy in the affected districts in Karnataka, with some suggesting that there may be broader lessons to be learnt from the case about the influence of litigation on social welfare administration ([57]).

A major policy implication which resulted from the deliberations of the committee was an amendment on the books to the definition of out-of-school-children from being that where a child was from absent for 60 consecutive school days to absent for seven consecutive school days ([58]).

There was also an 'attendance authority' which was set up which would be tasked with contacting absentee children's parents in case the child had been absent for seven consecutive days ([59]) – this meant that authorities would act in a more timely and responsive manner than if they were permitted to wait for two months.

6.3. The Out-of-School-Children Case: subsequent issues

The Out-of-School-Children case is ongoing. Since the preliminary orders of the High Court in the case, some of its early success in reducing dropout numbers and encouraging their re-enrolment have been clawed back. There are concerns about whether the surveys adopted by the education authorities to obtain data to report to the Court ([60]), as well as concerns about the ability of teachers within the existing school infrastructure to manage to educate the new learners who had been introduced into the

([56]) G. MUKHERJEE and J. KOTHARI, *The Out of School Children Case: a model for court-facilitated dialogue?*, in *Oxford Human Rights Hub Blog*, 18 September 2015.

([57]) OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 58-59.

([58]) OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 64.

([59]) GOVERNMENT OF KARNATAKA, Notification ED 38 MAHITI 2013, 15 March 2014, in http://schooleducation.kar.nic.in/Prypdfs/rte/RTENotification150314.pdf .

([60]) SPECIAL CORRESPONDENT, *Survey of out-of-school children not done as per law*, in *The Hindu*, 11 March 2020, https://www.thehindu.com/news/national/karnataka/survey-of-out-of-school-children-not-done-as-per-law/article31042740.ece .

system as a result of the surge in re-enrolment of the dropped out children ([61]). This highlights the classic polycentric feature of social rights problems, where new considerations arise at every stage of the remedial process, which lends itself to an iterative manner of disposition, but may have unintended consequences which are not immediately foreseeable. In this case, even though the stated aim of dropout reenrollment was achieved, their reintegration into the learning cycle was impeded due to a lack of sufficient preparation or resource investment by the state.

7. Experimentalist remedial oversight: the Supreme Court and the right to food orders

An experimentalist remedial approach is most clearly visible in the 2001 judgment of the Supreme Court of India on the right to food ([62]), where it delivered a judgment ([63]) in a case where a number of state and local authorities had been impleaded by a petition brought by a social movement led organization which had sought to ensure that the right to food was recognized in Indian jurisprudence despite its textual absence from the Constitution. The petitions sought that "that the right to food should be recognised as a legal right of every person in the country, whether woman or man, girl or boy"([64]). The case, like the Out of School Children dispute from the Karnataka High Court, continues till date ([65]), confirming Bhuwania's thesis ([66]), about the nature of public interest litigation in India becoming decoupled from the original cause of action and the relief sought by petitioners.

The orders in the Right to Food litigation, through the use of series of interpretive moves, converted certain discretionary, means-tested federal government-run schemes relating to social welfare like nutrition and early childhood maternity care, and a few kinds of basic social security into a right. However, one of the most startling aspects of

([61]) This is highlighted in OPEN SOCIETY JUSTICE INITIATIVE, *Strategic Litigation Impact*, quoted, 64: "Some teachers in government schools in the districts in North Eastern Karnataka, which in recent years has seen a surge of previously out-of-school children joining school, complained that it was challenging to teach large numbers of children who had never been to school before. These teachers expressed concerns that they were not equipped to teach these children, who were at a very different level from the rest of the class and that the government had provided them with little support in this regard" (footnotes omitted).

([62]) *People's Union for Civil Liberties v. Union of India & Ors*, in the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001, in https://www.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original .

([63]) *People's Union for Civil Liberties v. Union of India & Others*, quoted.

([64]) H. MANDER, *Food from the courts: the Indian experience*, in *IDS Bulletin. Special issue: standing on the threshold: food justice in India*, 43(1), 2012, 15-24.

([65]) The latest orders from the case concern the provision of basic necessities in homeless shelters in the city of New Delhi.

([66]) A. BHUWANIA, *Courting the people: the rise of public interest litigation in post-emergency India*, in *Comparative Studies of South Asia, Africa and the Middle East* 34(2), 2014, 314.

the case was what came next. Due to the proclivity of the Indian state to not comply with government orders in part or fully; as well as due to state and bureaucratic inertia, the Court decided to set up a separate institution to ensure that its orders would be complied with. In 2008, it set up a Commissionerate "to track side-by-side hunger and the implementation of interim orders relevant to the Right to Food Case across the country" ([67]). Harsh Mander, an experienced civil servant and social activist, stated that the orders of the Court with respect to the articulation of the right itself as well as the institutions for its realization "paved the way for an enforceable right to food for the first time, preventing governments from removing or diluting these schemes, under pressures to reduce fiscal burdens." ([68]). The task of the Commissionerate would be not only to consult with a number of stakeholder organizations, primarily in the social movement sector and the governments at the federal and sub-national levels, but also to oversee the implementation and performance of a number of government schemes.

In consultation with the relevant stakeholders, Commissioners identified priority areas for further improvement and recommended a number of changes to not only substantive entitlements, but also to the food security supporting infrastructure and bureaucracy. One of the most pressing issues in the allocative contests which non-universal social rights find themselves is the issue of which groups to prioritize and on what basis. Responding to this, the Supreme ordered a number of states in India to identify "vulnerable groups under their respective jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied." Recommendations made by the Commissioners included that "school meals should be locally produced, hot and cooked (and not dry snacks or grain which many governments distributed until then), hygienic, nutritious (of a prescribed minimum caloric level) and with varied menus for every day of the week." ([69]).

Many of the entitlements which had been made into rights as a result of this litigation eventually found itself being enshrined in statutory terms by the enactment of a federal food security legislation, thus showing the catalytic role which experimentalist remedies can have upon the legislative and governance process ([70]).

([67]) SUPREME COURT COMMISSIONERS, *What We Do*, available at http://www.sccommissioners.org/. The full text states that the Commissioners' "mandates are entrenched in orders dated 8 May 2002 and 29 October 2002. The former empowers them to investigate violations of interim orders related to the case and demand redress, while, the latter extends their authority to monitoring and reporting the implementation status of said orders to the Supreme Court and conducting inquiry to respective government authorities on their efforts in placing the orders functional."

([68]) H. MANDER, *Food from the courts: the Indian experience*, quoted, 18.

([69]) H. MANDER, *Food from the courts: the Indian experience*, quoted, 18.

([70]) G. MUKHERJEE, *The Supreme Court of India and the inter-institutional dynamics of legislated social rights*, Verfassung und Recht im Übersee, 2021 forthcoming, 54.

8. Conclusion

This paper identified certain current problems with the judicial enforcement of SER at a theoretical level and the manner in which constitutions attempt to deal with them at the level in the practice of constitutional litigation. I also advanced two models of democratic experimentalist review as a method of constitutional adjudication which has the capacity to address some of the concerns identified previously. However, there are certain limitations to this approach which inhere in its formulation. Social rights claims and claimants that do not enjoy cross-class and cultural support may end up getting disfavored, as seen in a number of cases in South Africa where 'meaningful engagement', such as in the *Mamba* ([71]), was ordered. The case involved members of the public who were politically powerless and invisible and the issue was the closure of refugee camps by the Gauteng government following a series of xenophobic attacks on certain groups of refugees. It has been argued that the government in the case did not negotiate in good faith ([72]). Additionally, in judiciary-centered jurisdictions like India, it is also important that the judiciary not become completely untethered to the managerial judge may go beyond remedies sought and impose ideological, and not legally bound solutions) ([73]). Finally, experimentalist judicial review mechanisms require careful calibration so as to not end up in an intractable cacophony of multiple voices in the process of litigation.

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([71]) *Mamba v Minister of Social Development* CCT 65/08 (21 August 2008).

([72]) B. RAY, *Proceduralisation's triumph and engagement's promise in socio-economic rights litigation*, in *South African Journal on Human Rights* 27, 2011, 107.

([73]) A. BHUWANIA, *Courting the people: the rise of public interest litigation in post-emergency India*, quoted, 314-335.

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